In the
United States Circuit Court of Appeals
For the Ninth Circuit

NORTHWESTERN STEVEDORING COMPANY, a corporation, and OCCIDENTAL INDEMNITY COMPANY, a corporation,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremens' and Harborworkers' Compensation Act, and MARTIN MATHESON,
Appellees.

No. 5980

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEES

ANTHONY SAVAGE,
U. S. District Attorney,
JOHN T. MCCUTCHEON,
Asst. U. S. District Attorney,
For Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District;

WESLEY LLOYD,
For Martin Matheson, Office and P. O. Address: 527-532 Perkins Building, Tacoma, Washington;
Appellees.

Stanley Bell Printing Co.

In the
United States Circuit Court of Appeals
For the Ninth Circuit

NORTHWESTERN STEVEDORING COMPANY, a corporation, and OCCIDENTAL INDEMNITY COMPANY, a corporation, *Appellants*,

VS.

WM. A. MARSHALL, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremens' and Harborworkers' Compensation Act, and MARTIN MATHESON, *Appellees.*

No. 5980

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEES

The appellants have fairly, though briefly, stated the essential facts upon which the appeal is based. Addressing ourselves, then, immediately to the argument of the appellants, we will undertake to

demonstrate that the District Court was entirely warranted in refusing injunctive relief.

The appellants complain that the District Court has, in effect, disposed of their bill upon the merits. It was not only the duty of the Court to pass upon the merits of the controversy as set forth in the appellants' bill, but by such consideration of the merits the District Court was precluded from granting the injunctive relief prayed for. In the analysis of the case as presented by the appeal, we do not deem it necessary to enter upon a discussion of the right to injunctive relief in a proper case, nor to undertake to distinguish the rule as laid down by the District Judge in the case of *Benson v. Crowell*, 33 Fed. (2d) 137, for the reason that, whatever view this Court might take of the proposition as announced by the District Judge in that case, that question is not at issue here.

In this case, the appellants filed their bill seeking a review, and it will be observed that the only allegation in the bill which might entitle them to any equitable relief is contained in paragraph six thereof, which reads as follows:

> "That said compensation order and award of compensation is not in accordance with law and the provisions of the Longshoremen's and Harbor Workers' Compensation Act."

This is a conclusion of law, pure and simple, and cannot aid the pleader. The bill does allege that a

hearing was had before the Deputy Commissioner, and it sets forth by way of Exhibit "A" and Exhibit "B" a complete transcript of the testimony taken before the Deputy Commissioner, so that the only question that confronted the District Court was whether the bill itself, taken *pro confesso*, was sufficient to entitle the appellants to the equitable relief prayed for, upon which assumption, of course, they based their claim of right to injunctive relief.

It is, of course, elementary that an injunction will not lie to enforce *pendente lite*, a right that cannot be predicated upon the bill, and, as counsel for appellants says, the District Court has, in effect, ruled that the bill is vulnerable to a motion to dismiss for want of equity. In any event, it must stand or fall upon the testimony taken before the Commissioner. If that testimony fairly supports the Commissioner's finding and fairly warrants his order, then, of course, that order must stand, and in effect that is the finding of the District Judge on the denial of the injunction.

It may be conceded that the appellants would have a right to an injunction and to equitable relief in a proper case, but their bill in this case does not present facts which the District Judge concluded would warrant him in disturbing the Commissioner's finding.

The statute has made the Commissioner a finder of fact,

> Sec. 919 Title 33, U. S. Code, Compact Edition,

and though it further provides that hearing may be had upon a bill filed in the District Court in the event the Commissioner's decision is not in accordance with law, it certainly contemplates that the Commissioner's finding shall be *prima facie* evidence of its own verity, unless the complainants have alleged some fact which discredits it.

Appellants urge that they are entitled to a hearing *de novo*, but they plead no fact which could be a basis for further evidence than that taken before the Commissioner. They do not say or claim that they have new evidence or that the facts would be any different from the facts upon which the Commissioner's decision and finding are based. The District Court has then correctly concluded that, since the Deputy Commissioner had the witnesses before him and had evidence upon which his judgment might properly rest, there was nothing in the bill which would warrant the District Court in disturbing his finding. In other words, without allegations in the bill sufficient to raise an issue, the District Judge correctly ruled that he would not be justified in issuing an injunction.

The rule has been stated in the case of *Obrecht-Lynch Corporation vs. Clark*, 30 Fed. (2nd) 144, as follows:

> "The proper construction of the language in question seems to the Court to be that, as long as there is some competent evidence to support the finding of fact of the Commissioner, such finding is supported by rational and natural inferences from proved facts, the Court will not disturb such finding."

The Courts have in like cases been generally obliged to consider the merits of the case as a whole. In the case of *Merchants and Miners Trans. Co. vs. Norton et al.*, 32 Fed (2nd) 513, the District Judge, in passing upon the same question as is here presented, says:

> "The appellate revision by the Courts is restricted to the question of whether the order has been made in accordance with the law. The facts must thus be assumed to be as found."

Again, in the case of *F. Jaska Co., Inc., et al., vs. Monahan*, 29 Fed. (2nd) 741, the court holds that the finding of fact made by the Deputy Commissioner is a final adjudication.

Again, in the case of *Howard et al vs. Monahan*, 31 Fed. (2nd) 480, the decedent workman's representative challenged the sufficiency of the evidence before the Deputy Commissioner to sustain the finding, and alleged that it was not in accordance with law in that the evidence permitted no reasonable conclusion other than that the claimant's death was caused by the injury. The District Judge, in passing upon that claim, refused to grant the in-

junctive relief prayed for, and, as in the case at bar, considered the bill upon its merits, holding, among other things:

> "The conclusion of the Commissioner will be looked upon as a finding of fact."

The question under the rule, then, presented to this Court is whether or not there is substantial evidence in the record as pleaded by the complainant to sustain the Commissioner's finding. For the convenience of the Court we call attention to the following matters:

You will note that it was claimed by the experts introduced by the employer and insurer that the workman had a calcification of the semi-lunar cartilage. That is, bony changes had taken place about the knee joint, and arthritis of the injured knee was found. The question presented to the Commissioner was whether the injury or the arthritis caused the condition in which the workman was at the time of the hearing.

Dr. Schaffer, called by the employer, testified that there was no arthritis evident in the other knee. (Record, p. 12.)

Dr. Anderson, appointed to make the examination on behalf of the Commissioner, testified that if arthritis is present in one knee it usually is in the other, concurrently, too, in regard to symtoms.

Dr. Schaffer again testified as follows (referring to the injury):

Q. And would not that condition probably aggravate the arthritic condition?

A. Yes, sir.

P. 14, Record.

Dr. Heaton was called on behalf of the employer and testified as follows:

Q. What is the cause of Mr. Matheson's disability — his present disability?

A. Well, it is a combination, in my estimation, of both the previous condition, and the injury.

Q. What causes you to say it is the result, in any degree, of the injury?

A. Because it has been — because the date of his disability and his inability to keep going for any length of time has dated from that injury.

Q. Could you, with any sound science, attempt to segregate the extent of the disability that is caused by the bony changes from the extent of the disability that is caused by the injury?

A. I don't believe so.

Q. Would a knee in the condition you found Mr. Matheson's knee to be, be particularly susceptible — would the condition be particularly susceptible to aggravation or acceleration by reason of an injury?

A. Very much so.

Q. And if it were a fact that the man had been so employed during the preceding year, so as to enable him to earn $1,829, and he had an injury, even with this pre-existing condition, is there any ground or any fair basis upon which a conclusion could be based that he would have had a disability since the date of the injury, had it not been for the injury?

A. That is hard — it is hard to do that. We know that he was working steadily, and my knowledge of Mr. Matheson has led me to believe to a large degree that the disability in his work was due to his injury.

Q. What, in your opinion, is the percentage of the disability of that knee at the present time?

A. Oh, I should say thirty or forty per cent. at least — possibly more . . . . . at least that much, because I know that he cannot use it very long at a time.

Pp. 19-20-21, Record.

Dr. Buckner, also called on behalf of the employer, testified:

Q. Isn't it entirely probable, Doctor, that an injury such as this could have lightened up or aggravated his pre-existing condition?

A. It probably aggravated it or accelerated the condition to a certain extent, yes.

Q. In other words, if I might put it this way, would not a knee in that condition be particularly susceptible to injury?

A. Oh, yes, I should say that.

Pp. 29-30, Record.

Dr. Anderson, called by the Deputy Commissioner, on behalf of the claimant, testified:

(By the Commissioner):

. . . . . I am desiring to ascertain, in your judgment, as to what the total disability of the knee is now by that arthritis — whether it be from arthritis or from an aggravation of the arthritis by reason of the injury, and the disability from the inpury too?

A. In my opinion — I examined him on the 12th day of April, 1929, and my opinion is that there was at least 35 to 45 per cent. of disability in regards to the function of his right leg, taken as a whole, for his heavy previous duty of longshoring, both as a result — that is, the disability is both the result of his existing arthritis and of his injury.

Q. The leg, in the condition in which this right leg of Mr. Matheson was at the time of the injury, was one that is particularly susceptible to injury?

A. Yes, sir.

Q. Is there any way definitely to determine that had it not been for the injury he would have been disabled at any particular time or at any certain time in the future?

A. It is unable (impossible) to state to my knowledge from any method as to when he would be disabled, but I could add, as a qualifying statement to that, that if arthritis is in one knee, it is in the other knee, I think, too, concurrently in regards to symptoms.

Pp. 31-32-33, Record.

In consideration of the state of record, and in view of the fact that there is no affidavit of merits from which the trial judge could reasonably conclude that the complainants would probably ultimately prevail, we respectfully submit that the trial court was fully justified in denying the injunction prayed for.

ANTHONY SAVAGE,
JOHN T. MCCUTCHEON,
WESLEY LLOYD,
Attorneys for Appellees.